Denver Law Review

Volume 52 | Issue 2 Article 8

March 2021

Real Property - Mortgages - Colorado's Curative Default Statute

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COMMENT

REAL PROPERTY—MORTGAGES—Colorado's Curative Default Statute—*Foster Lumber Co. v. Weston Constructors, Inc.*, 521 P.2d 1294 (Colo. Ct. App. 1974).

A Colorado statute enacted in 1965 enables mortgagors[1] to prevent foreclosure by curing the default on which a mortgage foreclosure action is based.[2] Not until the recent case of *Foster Lumber Co. v. Weston Constructors, Inc.*,[3] however, did a Colorado appellate court construe this curative default statute.[4] Although the court in *Foster* made a legally defensible construction

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[1] "Mortgage" and related terms are used here generically and include "deed of trust." For a discussion of the differences between a mortgage and a deed of trust, see G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 17 (2d ed. 1970).

[2] COLO. REV. STAT. ANN. § 38-39-118 (1973). The statute reads:

> (1) Whenever the only default or violation in the terms of the note and deed of trust or mortgage being foreclosed is nonpayment of any sum due thereunder, the owners of the property being foreclosed or parties liable thereon shall be entitled to cure said particular default if, at least five days prior to the date fixed for the foreclosure sale, such owners or parties give written notice to the public trustee, sheriff, or other officer conducting the sale of their intention to cure said default and violation and if, on or before twelve o'clock noon of the date before the day upon which said sale is set, the owners or parties pay to the officer conducting the sale all delinquent principal and interest payments which are due as of the date of such payment exclusive of that portion of the principal which would not have been due in the absence of acceleration, plus all costs, expenses, late charges, attorney's fees, and other fees incurred by the holder of such note, deed of trust, or mortgage as of the date of payment in connection with such proceedings for collection and foreclosure.
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> (2) Upon receipt by the officer conducting the sale of the said notice of intention to cure the default and violation, such officer shall obtain in writing from the holder of the note, deed of trust, or mortgage a statement of all sums of principal, interest, costs, expenses, late charges, attorney's fees, and such other fees as aforesaid necessary to cure said default and violation. Upon payment of all withdrawal fees and costs plus an additional thirty-five dollars public trustees' costs to the officer conducting said sale on or before twelve o'clock noon as provided in this section, in the form of a certified check or cash, all proceedings for foreclosure shall terminate. The officer conducting the sale shall forthwith deliver said sum to the holder of the note, deed of trust, or mortgage.
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> (3) Nothing in this section shall constitute a waiver of any right accruing after a subsequent violation of any covenant of said note, deed of trust, or mortgage.

Some other jurisdictions have similar curative default statutes. *See, e.g.*, CAL. CIV. CODE § 2924c (West 1974); ILL. ANN. STAT. ch. 95, § 57 (Smith-Hurd Supp. 1974); ORE. REV. STAT. § 86.760 (1974).

[3] 521 P.2d 1294 (Colo. Ct. App. 1974).

[4] At the time the statute was construed it was COLO. REV. STAT. ANN. § 118-9-18 (Supp. 1969).

of the poorly drafted statute, dicta in the opinion support an interpretation of the statute which would permit a mortgagee to circumvent the statutory purpose. This comment will examine that apparent inconsistency.

I. THE *Foster* OPINION

Foster conveyed property to one of the defendants in exchange for a promissory note secured by a first deed of trust. Two other defendants subsequently assumed the obligation. When two monthly installments were not paid, Foster filed an election and demand for foreclosure, and a sale was set. Foster then discovered that contrary to a covenant in the deed of trust, property taxes for the preceding year had not been paid. One defendant attempted to cure the default by tendering the past due installments and receipts from the payment of the property taxes. Foster would not accept the tender and the public trustee refused to foreclose, whereupon Foster brought suit.[5]

Foster did not question the mortgagor's right under the curative default statute to cure a default resulting from a failure to pay past due installments of principal and interest. Instead, Foster objected to the public trustee's position that the statute also cured defaults resulting from a failure to pay real property taxes when due. Additionally, it was Foster's contention that even if foreclosure of the deed of trust were barred, the curative default statute did not prohibit a suit on the note. The court of appeals held that (1) the statute applies to a default resulting from a failure to pay real property taxes, and (2) a mortgagor's compliance with the statute precludes the mortgagee from pursuing an independent claim on the note.

A. *Nonpayment of Taxes*

In describing the type of default which may be cured, the Colorado statute first refers to a default consisting of

[5] Foster's complaint had two claims, the first of which was for the amount due on the promissory note secured by a deed of trust. The second claim was an action under rule 106 of the *Colorado Rules of Civil Procedure* to compel the public trustee to conduct a foreclosure sale pursuant to the terms of the deed of trust. The lower court dismissed both claims of Foster's complaint by granting defendants' motion to dismiss for failure to state a claim. Because the court went beyond the pleadings and considered affidavits submitted by the parties, the motion should have been treated as one for summary judgment. COLO. R. CIV. P. 12(b). The court of appeals modified the lower court's order to provide that summary judgment be entered in favor of the defendants and, as modified, affirmed the lower court's judgment.

"*nonpayment of any sum due*"[6] under the note and mortgage or deed of trust, but then specifies only "delinquent principal and interest payments . . . plus all costs, expenses, late charges, attorney's fees, and other fees incurred by the holder of such note. . . ."[7] as those sums which must be paid to effect the cure.[8] In its appellate brief, Foster advanced several arguments to show that the statute should not apply to the nonpayment of taxes.[9] The court did not address itself to any of Foster's specific arguments on this point, but summarily stated that "the phrase 'any sum due thereunder' is susceptible to an interpretation including delinquent taxes."[10] The rule of construction that a remedial statute should be liberally construed to effectuate its remedial pur-

[6] COLO. REV. STAT. ANN. § 38-39-118 (1973) (emphasis added).

[7] *Id.*

[8] The more clearly drafted California statute specifies a

> default in payment of interest or of any installment of principal, or . . . failure of trustor or mortgagor to pay, in accordance with the terms of such obligation or of such deed of trust or mortgage, taxes, assessments, premiums for insurance or advances made by beneficiary or mortgagee in accordance with the terms of such obligation or of such deed of trust or mortgage . . .

as one which may be cured. CAL. CIV. CODE § 2924c (West 1974). The Oregon statute also expressly permits the curing of the same defaults as those listed above in the California statute. ORE. REV. STAT. § 86.760 (1974). The Illinois statute refers more generally to "a default under the terms of the trust deed or mortgage." ILL. ANN. STAT. ch. 95, § 57 (Smith-Hurd Supp. 1974).

[9] For instance, Foster correctly pointed out that the statute does not specifically refer to taxes or insurance which, it said, "would have been easy to add." Brief for Appellant at 10, Foster Lumber Co. v. Weston Constructors, Inc., 521 P.2d 1294 (Colo. Ct. App. 1974). Foster also pointed to the language of the statute, which requires a "default or violation in the terms of the note *and* deed of trust." *Id.* Because the obligation to pay taxes was in the trust deed alone and not also in the note, as the conjunction "and" would require, Foster argued that this type of default was not within the statutory language. *Id.* Foster also cited the maxim *inclusio unius est exclusio alterius*, by which the inclusion of the specified items of principal and interest would exclude the nonpayment of taxes as a curable default. *Id.* at 11. While the technical problems in the statute on which the first two arguments are based can most likely be attributed to careless drafting, rather than to any intention on the part of the legislature to achieve subtle distinctions, the last mentioned argument has more merit.

The maxim *expressio unius est exclusio alterius* means that the "expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (4th ed. 1968). The *expressio unius* maxim, while differing slightly from the one cited by Foster, is substantially the same, and comments about one would apply equally well, it seems, to the other. The *expressio unius* maxim is not particularly "legal," but rather is the result of common sense and general experience that when people say one thing they do not mean another. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.24 (4th ed. C. Sands 1973). The maxim, however, is only an aid to construction and not a rule of law, and "can never override clear and contrary evidences of . . . [legislative] intent." Neuberger v. Commissioner, 311 U.S. 83, 88 (1940).

[10] 521 P.2d at 1297.

pose[11] would have adequately countered Foster's arguments on this issue. While the court did not adopt that rule in reaching its decision, it did reach the consistent conclusion that

> [t]he statute must be interpreted so as to carry out the general legislative intent, which was to permit debtors to prevent foreclosure of mortgages or deeds of trust in instances in which the creditor's interests will not be jeopardized.[12]

In this case Foster's interests were not in jeopardy because the mortgagor did pay the unpaid taxes, and thus "[t]he lien for unpaid taxes was . . . dissolved and any impairment of the creditor's collateral resulting from overdue taxes vanished."[13]

B. *No Action on the Note*

In its second holding the court barred the initiation of an action on the note once a mortgagor has complied with the statute. Because the effect of curing a default under the statute is to make the mortgagee whole as if no default had ever occurred, the court concluded that without the necessary element of a default, the mortgagee had no basis upon which to declare an acceleration of the note. Such a construction is essential if the statute is to provide any substantive relief to mortgagors. As the court noted, a contrary decision would permit a mortgagee to easily circumvent the effect of the statute and to achieve indirectly what it was prevented from doing directly.[14]

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[11] 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 60.01 (4th ed. C. Sands 1974). A liberal construction is one which makes the statutory rule apply to more situations than it would under a strict construction. *Id.* Courts have generally given the term "remedial" a limited meaning and have applied it to legislation that is not penal or criminal in nature. The term is also used to describe legislation of a procedural nature that does not affect substantive rights. *Id.* § 60.02. Colorado's statute meets both tests and thus qualifies for a liberal construction. The statute is not penal or criminal in nature. While it could be argued that the statute abrogates the mortgagee's right to foreclose, the statute is merely a procedural postponement of the exercise of that right. A California case, in applying its similar curative default statute, CAL. CIV. CODE § 2924c (West 1974), said that the purpose of the statute is not extinguishment of the ultimate obligation. Magnus v. Morrison, 93 Cal. App. 2d 1, 208 P.2d 407 (Dist. Ct. App. 1949). The Colorado statute does not affect the mortgagor's ultimate obligation to pay the debt.

[12] 521 P.2d at 1297.

[13] *Id.*

[14] Permitting a mortgagee to sue on the note after the default which was the basis of the acceleration had been cured would subject the mortgagor to liability for the entire debt. The court said that this construction urged by the plaintiff would allow a creditor to levy on the real property covered by the deed of trust after obtaining a judgment on the note.

II. Additional Statutory Problems

A. *No Right to Cure Without Foreclosure Action*

A significant question regarding the scope of the statute arises from dicta in the *Foster* case. The court pointed out that the statute applies only to foreclosure proceedings and that "[s]tatutory coverage is therefore triggered by initiation of foreclosure proceedings on the mortgage or deed of trust."[15] In Colorado, however, a mortgagee is not obligated to foreclose. It has the independent remedy of pursuing an action on the note.[16] Because the Colorado curative default statute is limited by its language to foreclosure proceedings, an interpretation supported by dicta in the *Foster* case itself, the statute might have the anomalous effect of encouraging a mortgagee to avoid its impact by bringing an action on the note, rather than a foreclosure proceeding. In that event, the mortgagor would have no right to cure the default, which would have been curable had a foreclosure action been elected by the mortgagee, and the mortgagor would be fully liable on any judgment resulting from the action.

B. *Statutory Coverage When Foreclosure Follows Action on Note*

In order to give full effect to its remedial nature, the statute should be interpreted to allow the curing of a default if the mortgagee first commences an action on the note, and even if it obtains a judgment for the entire debt, and then institutes foreclosure proceedings. Such an interpretation would permit the mortgagor to avoid foreclosure, which clearly is the statutory intent. Although a mortgagor would still be personally liable for any judgment on the note, the mortgagee would be prevented from reaching the mortgaged property, except possibly in execution as

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[15] 521 P.2d at 1298. The court also said, "It is important to note . . . that by its terms, the statute applies only to deeds of trust or mortgages 'being foreclosed' and that the statutory mechanism for tender operates through the public trustees or other officers 'conducting the sale.' " *Id.*

[16] Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co., 155 Colo. 232, 393 P.2d 749 (1964); Greene v. Wilson, 90 Colo. 562, 11 P.2d 225 (1932); Folda Real Estate Co. v. Jacobsen, 75 Colo. 16, 223 P. 748 (1924). Some jurisdictions have a "one action rule," which differs from the law in Colorado by requiring a mortgagee to exhaust the security by a foreclosure proceeding before the general assets of the mortgagor can be reached. G. Osborne, Handbook on the Law of Mortgages § 334 (2d ed. 1970). *See, e.g.*, Cal. Civ. Pro. Code § 726 (West Supp. 1974); Idaho Code § 6-101 (Supp. 1974); Mont. Rev. Codes Ann. § 93-6001 (1964); Nev. Rev. Stat. § 40.430 (1973); Utah Code Ann. § 78-37-1 (Supp. 1973).

a judgment creditor.[17] A construction of the statute which would allow the mortgagor to cure a default and prevent foreclosure notwithstanding its personal liability on the debt would not be at odds with the language of the statute, which merely refers to any foreclosure proceeding. The applicability of the statute is not restricted to foreclosure proceedings occurring *before* an action on the note, and thus the statute should provide coverage when the foreclosure proceeding *follows* the note action.

III. SUGGESTED LEGISLATIVE AMENDMENTS

Because these problems of construction and application are due primarily to poor drafting, the legislature might consider amending the curative default statute. Amendment could accomplish several objectives. First, it could dispel statutory ambiguity and inconsistency of reference concerning the types of defaults which may be cured. The language of the statute should be expansive enough to include, as a minimum, any type of default which may be cured by the payment of money.[18]

Second, amendment could make the curative right applicable when the mortgagee elects to first pursue an action on the note. Upon a mortgagee's commencement of an action on the note, a mortgagor should have the right to cure the default in a manner similar to that provided by the statute for foreclosure actions. A right to cure at this point would cut off any further action on the note. Since the same default gives rise to both of the mortgagee's remedies, foreclosure and an action on the note, the mortgagor's right to cure the default should not depend upon which remedy the mortgagee elects. This change could be achieved only by statutory amendment, because, in this instance, the restrictive language of the statute would preclude judicial construction encompassing such an expanded curative right.

Third, the statute could be amended to limit the frequency

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[17] COLO. REV. STAT. ANN. § 13-52-102 (1973) provides that "[a]ll goods . . . and real estate of every person against whom any judgment is obtained . . . are liable to be sold on execution to be issued upon such judgment. . . ." *Id.* § 13-52-105 (1973) states that "[e]very interest in land, legal and equitable, shall be subject to levy and sale under execution . . . ." Of course, if the mortgaged property qualifies for the homestead exemption, *id.* § 38-41-201 (1973) would limit a mortgagee's right to levy against that property.

[18] Additional defaults which could be included in the statute are a mortgagor's failure to pay assessments, insurance premiums, or advances made by the mortgagee. The California statute, CAL. CIV. CODE § 2924c (West 1974), and the Oregon statute, ORE. REV. STAT. § 86.760 (1974), both expressly include these defaults. See note 8 *supra* for the pertinent language of the California statute.

with which a mortgagor may avail itself of the benefits of the statute, since a mortgagor's repeated use of the right to cure defaults may place an unfair burden on the mortgagee. The curative default statute of Illinois[19] seems to recognize the desirability of granting mortgagors some relief without thereby unduly burdening mortgagees. That statute provides that

> [t]he relief granted by this Section shall not be exhausted by a single use thereof, but shall not be again available under the same trust deed or mortgage for a period of 5 years from the date of the dismissal of such proceedings.[20]

The use of such a limitation would achieve a more equitable balance between the needs and rights of the parties.

Fourth, the statute could set a maximum attorney's fee which may be included in the fees that the mortgagor must pay to effect a cure.[21] Such a provision would prevent a mortgagee from using prohibitive attorney's fees to discourage a mortgagor from exercising its statutory right to cure. The additional fees which a mortgagor must pay to cure a default are presumably not punitive, but are intended only to compensate the mortgagee for its actual costs in bringing a foreclosure suit. A statutory limitation on the amount of attorney's fees recoverable under the statute[22] could ensure that this provision is used for the purpose of compensation only.

IV. CONCLUSION

In the *Foster* case the Colorado Court of Appeals construed the remedial curative default statute and made a legally defensible construction insofar as the issues of the case required. Unanswered questions about the scope and operation of the statute could be resolved by legislative amendment. Absent such action, however, Colorado courts may face these questions in future cases; should this happen, it is hoped that they will construe the statute to further its remedial purposes.

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[19] ILL. ANN. STAT. ch. 95, § 57 (Smith-Hurd Supp. 1974).

[20] *Id.*

[21] Mortgage loans falling within the scope of the UNIFORM CONSUMER CREDIT CODE (U.C.C.C.) would be subject to COLO. REV. STAT. ANN. § 5-3-514 (1973), which limits attorney's fees to a reasonable sum not in excess of 15 percent of the unpaid debt. Relief under the U.C.C.C. is not intended to extend to the first mortgage market, however, and the U.C.C.C. does not apply to the typical case in which the curative default statute is invoked. *See id.* § 5-3-105 (1973).

[22] *See, e.g.*, CAL. CIV. CODE § 2924c (West 1974); ORE. REV. STAT. § 86.760 (1974).